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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**OUTERBRIDGE ACCESS
ASSOCIATION, SUING ON BEHALF
OF DIANE CROSS; and DIANE
CROSS, An Individual,**

Plaintiffs,

v.

**HOME DEPOT U.S.A., INC.
d.b.a. THE HOME DEPOT #6679;
MIRA MESA MARKETPLACE WEST,
LLC; AND DOES 1 THROUGH 10,
Inclusive,**

Defendants.

Case No.: 08cv0046 JM (JMA)

**[PROPOSED] FIRST AMENDED
COMPLAINT**

**DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS**

[42 U.S.C. 12182(a) ET. SEQ]

DEMAND FOR JURY TRIAL

[F.R.Civ.P. rule 38(b)]

INTRODUCTION

1. Plaintiffs OUTERBRIDGE ACCESS ASSOCIATION, SUING ON BEHALF OF DIANE CROSS AND ITS MEMBERS; and DIANE CROSS, An Individual, herein complain, by filing this Civil Complaint in accordance with rule 8 of the Federal Rules of Civil Procedure in the Judicial

1 District of the United States District Court of the Southern
2 District of California, that Defendants have in the past, and
3 presently are, engaging in discriminatory practices against
4 individuals with disabilities, specifically including minorities
5 with disabilities. Plaintiffs allege this civil action and others
6 substantial similar thereto are necessary to compel access
7 compliance because empirical research on the effectiveness of
8 Title III of the Americans with Disabilities Act indicates this
9 Title has failed to achieve full and equal access simply by the
10 executive branch of the Federal Government funding and promoting
11 voluntary compliance efforts. Further, empirical research shows
12 when individuals with disabilities give actual notice of potential
13 access problems to places of public accommodation without a
14 federal civil rights action, the public accommodations do not
15 remove the access barriers. Therefore, Plaintiffs make the
16 following allegations in this federal civil rights action:

17 **JURISDICTION AND VENUE**

18 2. The federal jurisdiction of this action is based on the
19 Americans with Disabilities Act, 42 United States Code 12101-
20 12102, 12181-12183 and 12201, et seq. Venue in the Judicial
21 District of the United States District Court of the Southern
22 District of California is in accordance with 28 U.S.C. § 1391(b)
23 because a substantial part of Plaintiffs' claims arose within the
24 Judicial District of the United States District Court of the
25 Southern District of California.

26 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

27 3. Defendants are, and, at all times mentioned herein, were, a
28

1 business or corporation or franchise organized and existing and/or
2 doing business under the laws of the State of California.

3 Plaintiff is informed and believes and thereon alleges that
4 Defendant HOME DEPOT U.S.A., INC. is the owner, operator,
5 franchiser, licensor, and/or is doing business as THE HOME DEPOT
6 #6679. Defendant HOME DEPOT U.S.A., INC. d.b.a. THE HOME DEPOT
7 #6679 is located at 10604 Westview Parkway, Mira Mesa, California
8 92126, Assessor Parcel Number: 318-600-03. Plaintiff is informed
9 and believes and thereon alleges that Defendant MIRA MESA
10 MARKETPLACE WEST, LLC is the owner, operator, and/or lessor of the
11 real property located at 10604-10678 Westview Parkway, Mira Mesa,
12 California 92126, Assessor Parcel Number: 318-600-03. Defendant
13 MIRA MESA MARKETPLACE WEST, LLC is located at 101 North Westlake
14 Blvd., #201, Westlake Village, California 91362.

15 4. The words Plaintiff, Plaintiffs, Plaintiff's Member, and
16 Plaintiff's Members as used herein specifically include
17 OUTERBRIDGE ACCESS ASSOCIATION, SUING ON BEHALF OF DIANE CROSS and
18 DIANE CROSS, An Individual.

19 5. Defendants Does 1 through 10, were at all times relevant
20 herein subsidiaries, employers, employees, agents, of HOME DEPOT
21 U.S.A., INC. d.b.a. THE HOME DEPOT #6679; and MIRA MESA
22 MARKETPLACE WEST, LLC. Plaintiffs are ignorant of the true names
23 and capacities of Defendants sued herein as Does 1 through 10,
24 inclusive, and therefore sue these Defendants by such fictitious
25 names. Plaintiffs will pray leave of the court to amend this
26 complaint to allege the true names and capacities of the Does when
27 ascertained.
28

1 6. Plaintiffs are informed and believe, and thereon allege, that
2 Defendants and each of them herein were, at all times relevant to
3 the action, the owner, lessor, lessee, franchiser, franchisee,
4 general partner, limited partner, agent, employee, representing
5 partner, or joint venturer of the remaining Defendants and were
6 acting within the course and scope of that relationship.
7 Plaintiffs are further informed and believe, and thereon allege,
8 that each of the Defendants herein gave consent to, ratified,
9 and/or authorized the acts alleged herein to each of the remaining
10 Defendants.
11

12 **CONCISE SET OF FACTS**

13 7. Plaintiff OUTERBRIDGE ACCESS ASSOCIATION is an organization
14 that advocates on the behalf of its members with disabilities when
15 their civil rights and liberties have been violated. Plaintiff's
16 member DIANE CROSS is a member of Plaintiff Organization and has
17 physical impairments and due to these physical impairments she has
18 learned to successfully operate a wheelchair. Further,
19 Plaintiff's Member and Plaintiff DIANE CROSS' said physical
20 impairments substantially limits one or more of the following
21 major life activities including but not limited to: walking.

22 8. On January 26, 2007, Plaintiff CROSS went to Defendants'
23 public accommodation facilities known as HOME DEPOT U.S.A., INC.
24 d.b.a. THE HOME DEPOT #6679, (hereinafter "THE HOME DEPOT #6679"),
25 located at 10604 Westview Parkway, Mira Mesa, California 92126,
26 Assessor Parcel Number: 318-600-03, to utilize their goods and/or
27 services accompanied by a friend. When Plaintiff CROSS patronized
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1 Defendants' facilities, she was unable to use and/or had
2 difficulty using the public accommodations' facilities including
3 but not limited to the service counters, cashier checkout aisle,
4 and women's restroom facilities as said were not accessible
5 because they failed to comply with ADA Access Guidelines For
6 Buildings and Facilities (hereafter referred to as "ADAAG" and
7 codified in 28 C.F.R. Part 36, App. A). Defendants failed to
8 remove barriers to equal access within their public accommodation
9 facilities known as THE HOME DEPOT #6679.

10 9. Plaintiff CROSS personally experienced difficulty with said
11 access barriers at THE HOME DEPOT #6679. The following examples of
12 known barriers to access are not an exhaustive list of the
13 barriers to access that exist at Defendants' facilities. For
14 example, the Special Service counter and the Contractor Service
15 counter fail to be accessible, as they are impermissibly high and
16 fail to provide disabled signage.

17 10. There fails to be any designated accessible checkout aisles
18 displaying the required signage.

19 11. The women's restroom fails to be accessible, as the entrance
20 door to the women's restroom requires an excessive amount of
21 pressure to operate. The soap dispensers within the women's
22 restroom fail to be accessible, as they are mounted too high. The
23 feminine product dispenser within the women's restroom fails to be
24 accessible, as a bench impermissibly blocks access to this
25 dispenser.

26 12. Plaintiffs can prove these barriers as Plaintiffs conducted a
27 preliminary survey of Defendants' facilities. Plaintiff
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1 Association alleges that its visually and hearing impaired members
2 desire to go to Defendants' facility but cannot because of lack of
3 auxiliary aids. Plaintiffs specifically allege that Defendants
4 knew, to a substantial certainty, that the architectural barriers
5 precluded wheelchair access. First, Plaintiffs will prove that
6 Defendants had actual knowledge that the architectural barriers
7 precluded wheelchair access and that the noncompliance with ADAAG
8 as to accessible entrances was intentional. Second, due to the
9 abundance of ADA information and constant news covers of ADA
10 lawsuits, Defendants had actual knowledge of the ADA and decided
11 deliberately not to remove architectural barriers. Third,
12 Defendants have no plans to remodel. Fourth, Defendants had
13 actual knowledge of ADA given all the ADA public awareness
14 campaigns, the abundance of free ADA information and the media's
15 constant ADA coverage. Fifth, a human being acting for the
16 defendants made a conscious decision as to how to proceed given
17 the presence of the architectural barriers. Plaintiffs allege
18 any alternative methods preclude integration of wheelchair
19 patrons, as it requires them to use a second-class entrance.
20 Also, expert testimony will show the facility contained
21 inaccessible features. Plaintiffs allege businesses often state
22 that they have few customers with disabilities. Plaintiffs allege
23 such customers avoid patronizing inaccessible business and are
24 deterred from patronizing such businesses.

25 13. Plaintiff's Member and Plaintiff DIANE CROSS intends to
26 return to Defendants' public accommodation facilities in the
27 immediate future. Plaintiffs' Member and Plaintiff DIANE CROSS is
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1 presently deterred from returning due to her knowledge of the
2 barriers to access that exist at Defendants' facilities.

3 14. Pursuant to federal law, Defendants are required to remove
4 barriers to their existing facilities. Further, Defendants had
5 actual knowledge of their barrier removal duties under the
6 Americans with Disabilities Act before January 26, 1992. Also,
7 Defendants should have known that individuals with disabilities
8 are not required to give notice to a governmental agency before
9 filing suit alleging Defendants failed to remove architectural
10 barriers.

11 15. Based on these facts, Plaintiffs allege they were
12 discriminated against each time they patronized Defendants'
13 facilities. Plaintiff's Member and Plaintiff DIANE CROSS was
14 extremely upset due to Defendants' conduct.

15 NOTICE

16 16. Plaintiffs are not required to provide notice to the
17 defendants prior to filing a complaint. *Botosan v. Paul McNally*
18 *Realty*, 216 F.3d 827, 832 (9th Cir 2000).
19

20 **WHAT CLAIMS ARE PLAINTIFFS ALLEGING AGAINST EACH NAMED DEFENDANT**

21 17. HOME DEPOT U.S.A., INC. d.b.a. THE HOME DEPOT #6679; MIRA
22 MESA MARKETPLACE WEST, LLC; and Does 1 through 10 will be referred
23 to collectively hereinafter as "Defendants."

24 18. Plaintiffs aver that the Defendants are liable for the
25 following claims as alleged below:

26 DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS

27 FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- Claims Under The
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Americans With Disabilities Act Of 1990CLAIM I AGAINST ALL DEFENDANTS: Denial Of Full And Equal Access

19. Based on the facts plead at ¶¶ 7 - 15 above and elsewhere in this complaint, Plaintiff's Member and Plaintiff DIANE CROSS was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations. Plaintiffs allege Defendants are a public accommodation owned, leased and/or operated by Defendants. Defendants' existing facilities and/or services failed to provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus, Plaintiff's Member and Plaintiff DIANE CROSS was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff's Member and Plaintiff DIANE CROSS was denied equal access to Defendants' existing facilities.

20. Plaintiff's Member and Plaintiff DIANE CROSS has physical impairments as alleged in ¶ 7 above because her conditions affect one or more of the following body systems: neurological, musculoskeletal, special sense organs, and/or cardiovascular. Further, Plaintiff's Member and Plaintiff DIANE CROSS' said physical impairments substantially limits one or more of the following major life activities: walking. In addition, Plaintiff's Member and Plaintiff DIANE CROSS cannot perform one or more of the said major life activities in the manner, speed, and duration when compared to the average person. Moreover, Plaintiff's Member and Plaintiff DIANE CROSS has a history of or has been classified as having a physical impairment as required by 42 U.S.C. § 12102(2)(A).

CLAIM II AGAINST ALL DEFENDANTS: Failure To Make Alterations In
Such A Manner That The Altered Portions Of The Facility Are
Readily Accessible And Usable By Individuals With Disabilities

21. Based on the facts plead at ¶¶ 7 - 15 above and elsewhere in this complaint, Plaintiff's Member and Plaintiff DIANE CROSS was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by Defendants. Defendants altered their facility in a manner that affects or could affect the usability of the facility or a part of the facility after January 26, 1992. In performing the alteration, Defendants failed to make the alteration in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in violation of 42 U.S.C. §12183(a)(2).

22. Additionally, the Defendants undertook an alteration that affects or could affect the usability of or access to an area of the facility containing a primary function after January 26, 1992. Defendants further failed to make the alterations in such a manner that, to the maximum extent feasible, are readily accessible to and usable by individuals with disabilities in violation 42 U.S.C. §12183(a)(2).

23. Pursuant to 42 U.S.C. §12183(a), this failure to make the alterations in a manner that, to the maximum extent feasible, are readily accessible to and usable by individuals with disabilities

1 constitutes discrimination for purposes of 42 U.S.C. §12183(a).
2 Therefore, Defendants discriminated against Plaintiffs in
3 violation of 42 U.S.C. § 12182(a).

4 24. Thus, Plaintiff's Member and Plaintiff DIANE CROSS was
5 subjected to discrimination in violation of 42 U.S.C. § 12183(a),
6 42 U.S.C. §12182(a) and 42 U.S.C. §12188 because Plaintiff's
7 Member and Plaintiff DIANE CROSS was denied equal access to
8 Defendants' existing facilities.

9
10 CLAIM III AGAINST ALL DEFENDANTS: **Failure To Remove Architectural**
11 **Barriers**

12 25. Based on the facts plead at ¶¶ 7 - 15 above and elsewhere in
13 this complaint, Plaintiff's Member and Plaintiff DIANE CROSS was
14 denied full and equal access to Defendants' goods, services,
15 facilities, privileges, advantages, or accommodations within a
16 public accommodation owned, leased, and/or operated by Defendants.

17 Defendants failed to remove barriers as required by 42 U.S.C. §
18 12182(a). Plaintiffs are informed, believe, and thus allege that
19 architectural barriers which are structural in nature exist within
20 the physical elements of Defendants' facilities. Title III
21 requires places of public accommodation to remove architectural
22 barriers that are structural in nature to existing facilities.
23 [See, 42 United States Code 12182(b)(2)(A)(iv).] Failure to
24 remove such barriers and disparate treatment against a person who
25 has a known association with a person with a disability are forms
26 of discrimination. [See 42 United States Code
27
28

1 12182(b)(2)(A)(iv).] Thus, Plaintiff's Member and Plaintiff DIANE
2 CROSS was subjected to discrimination in violation of 42 United
3 States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because they
4 were denied equal access to Defendants' existing facilities.

5
6 CLAIM IV AGAINST ALL DEFENDANTS: **Failure To Modify Practices,**
7 **Policies And Procedures**

8 26. Based on the facts plead at ¶¶ 7 - 15 above and elsewhere in
9 this complaint, Defendants failed and refused to provide a
10 reasonable alternative by modifying its practices, policies and
11 procedures in that they failed to have a scheme, plan, or design
12 to assist Plaintiffs and/or others similarly situated in entering
13 and utilizing Defendants' services, as required by 42 U.S.C. §
14 12188(a). Thus, Plaintiff's Member and Plaintiff DIANE CROSS was
15 subjected to discrimination in violation of 42 United States Code
16 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff's
17 Member and Plaintiff DIANE CROSS was denied equal access to
18 Defendants' existing facilities.

19 27. Based on the facts plead at ¶¶ 7 - 15 above, Claims I, II,
20 and III of Plaintiff's First Cause Of Action above, and the facts
21 elsewhere herein this complaint, Plaintiffs will suffer
22 irreparable harm unless Defendants are ordered to remove
23 architectural, non-architectural, and communication barriers at
24 Defendants' public accommodation. Plaintiffs allege that
25 Defendants' discriminatory conduct is capable of repetition, and
26 this discriminatory repetition adversely impacts Plaintiffs and a
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substantial segment of the disability community. Plaintiffs allege there is a national public interest in requiring accessibility in places of public accommodation. Plaintiffs have no adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiffs desire to return to Defendants' places of business in the immediate future. Accordingly, the Plaintiffs allege that a structural or mandatory injunction is necessary to enjoin compliance with federal civil rights laws enacted for the benefit of individuals with disabilities.

28. WHEREFORE, Plaintiffs pray for judgment and relief as hereinafter set forth.

DEMAND FOR JUDGMENT FOR RELIEF:

A. For injunctive relief pursuant to 42 U.S.C. § 12188(a). Plaintiffs request this Court enjoin Defendants to remove all architectural barriers in, at, or on their facilities.

B. For attorneys' fees pursuant to 42 U.S.C. § 1988, and 42 U.S.C. § 12205;

C. A Jury Trial and;

D. For such other further relief as the court deems proper.

Respectfully submitted:

PINNOCK & WAKEFIELD, A.P.C.

Dated: March 5, 2008

By: _____

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